WTO Negotiating Group on Rules

IDENTIFICATION OF CERTAIN MAJOR ISSUES UNDER THE ANTIDUMPING AND SUBSIDIES AGREEMENTS

In light of the Ministers' mandate to clarify and improve, while preserving the basic concepts, principles and effectiveness of, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement" or "ADA") and the Agreement on Subsidies and Countervailing Measures (the "Subsidies Agreement" or "ASCM"), the United States submits this paper to the Rules Negotiating Group ("the Group") for further consideration. This paper builds on the United States' previous submissions to the Group and identifies an additional range of issues to advance the dialogue in the Group.

The United States reserves its rights to identify additional areas for clarification and improvement in the future.

Perishable/Seasonal/Cyclical Products

The United States believes that the Group should clarify and improve the rules pertaining to issues particular to antidumping and countervailing duty investigations of perishable, seasonal, and cyclical products. These issues are of particular importance with regard to agricultural products. Producers (both exporters and those facing import competition) of perishable, seasonal, and cyclical products face unique challenges in the marketplace and are accustomed to operating on shorter business cycles. Such producers typically can sell their products only during certain months of the year due to the perishable nature of the products, the limitations on the growing and harvesting season, and consumer demands. As a result, such producers may be more vulnerable to dumped or subsidized imports that enter the domestic market during the limited portions of the year when their production is sold.

Given the special characteristics of these products, the United States believes that the current trade remedies could be improved in addressing the problems facing this area. For example, the provisions in ADA Article 4 and ASCM Article 16 concerning the definition of the domestic industry could be clarified to address the special circumstances raised when domestic and foreign producers have limited selling seasons. The lack of clarity in the Agreements may lead to delayed or ineffective relief for all such domestic producers that are directly affected by the injuriously dumped or subsidized imports.

Consistent with the mandate to preserve the effectiveness of the trade remedy rules, this Group should ensure that the special characteristics of perishable, seasonal, and cyclical products are properly addressed in the Rules negotiations.

Establishment of Overall Weighted-Average Dumping Margins

Prior to the Uruguay Round, some Members, including the United States, had the practice in antidumping investigations of comparing individual export transaction prices to average normal values. When combining the transaction-specific amounts calculated pursuant to this methodology, these Members cumulated the amount of dumping found (those situations in which Export Price (EP), or, when appropriate, Constructed Export Price (CEP), was less than Normal Value (NV)) and divided it by the aggregate value of all export transactions.

In the ADA, Members agreed on a different approach. Article 2.4.2 provides that, in the absence of targeted dumping, comparisons of EP and/or CEP with NV should be done based on either the weighted-averages of comparable products, or on a transaction-to-transaction basis. However, no further agreement was reached as to how these product or transaction-specific dumping margins should be used to calculate an overall weighted-average dumping margin for the exporter/producer. Thus, some Members continued to follow their pre-Uruguay Round practice in this area in all other respects.

In *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India*, a case involving the EC's application of its antidumping laws, the Appellate Body found that the language in Article 2.4.2 of the ADA prevented an authority from conducting its analysis on a model-by-model basis in situations where the authority determined that there was only one like product under investigation. The effect of this finding was to require investigating authorities to offset dumping margins on dumped models with "negative margins" for models that were not dumped.

The United States believes the Agreement is not clear as to the manner in which the overall weighted average margins are to be calculated. If there are to be any WTO obligations regarding such calculations, they should be the result of an agreement by the Members. Thus, in the process of clarifying the ADA, this Group should consider clarifying both the obligations already agreed to by the Members in this respect, as well as any areas where agreement could not previously be reached.

All-Others Rate

Under Article 9.4, authorities are required to calculate a dumping duty applicable to companies which do not have their own individual rate of duty. Such a rate, often referred to as the "all-others" rate, may also apply to new entrants to the market who do not request an individual rate under Article 9.5, or to companies that the authorities were unaware of at the time of the investigation. The "all-others" rate is essentially an average of the dumping margins of the companies which do have individual margins, excluding margins which are zero, *de minimis*, or were established on the basis of facts available under Article 6.8. The Appellate Body has found, in *United States - Hot-Rolled Carbon Steel Flat Products*, that this exclusion of facts available margins is not limited to margins based entirely on facts available. Nor is it limited to margins established, in part, on facts available that are based on an adverse assumption due to a company's lack of cooperation in the investigation.

This Group needs to examine this issue closely and seek to clarify Article 9.4 to ensure that the "all-others" rate can be calculated using appropriate and reasonable methods. This Group should consider whether under some circumstances it would be appropriate for calculated margins that incorporate minimal facts available or minor adjustments to be used when calculating the "all-others" rate. For example, a cooperative company in an antidumping investigation may provide all requested information about thousands of its export sales, but discover that it has simply misplaced information about the cost of packing materials on a select few sales. To fill in for this missing information when calculating the dumping margin, an authority may make the reasonable assumption that the cost of packing materials on the select few sales was the average of the cost of packing materials from the other thousands of properly reported and verified sales. Nevertheless, when the authority makes such an assumption pursuant to Article 6.8, the calculated rate for the company must be excluded from the "all-others" calculation under Article 9.4. Thus, the automatic exclusion of margins incorporating a minimal amount of facts available can render the "all-others" rate less accurate than would otherwise be the case. Depending on the case and the facts, the exclusion of margins that incorporate a minimal amount of facts available may serve either to increase or decrease the "all-others" rate.

Based on the experience of the United States, in many investigations, there will not be any margins which are completely free of the use of facts available and, thus, Article 9.4 will not be applicable. In such situations, Article 9.4 provides no guidance as to how the "all-others" rate should be calculated. This Group should consider whether Article 9.4 should be clarified to permit appropriate use of dumping margins which may include limited amounts of facts available information in calculating the "all-others" rate. Likewise, consideration should also be given to what clarification could be appropriately made in the ASCM in this regard.

New Shipper Reviews

Article 9.5 was added to the ADA during the Uruguay Round to address concerns that, in the face of a high **"**all-others**"** antidumping rate under Article 8.4, new entrants effectively would be precluded from making sales which they could use to establish their individual antidumping rates. Article 9.5 established procedures referred to as "new shipper" or "newcomer" reviews under which new entrants are only required to post a bond or other security in lieu of a cash deposit while a review is carried out to establish such an individual rate. While the United States supports the purpose of this provision, clarifications may be necessary to prevent misuse of this procedure in antidumping and countervailing duty proceedings.

The United States believes that companies can abuse the new shipper review process to undermine relief available under the trade remedy laws. Under Article 9.5, a company that is already found to be dumping during the investigation can simply establish a new corporate identity that makes one small and simple, yet abnormally high-priced, export sale to a collusive customer. The new company may then request a new shipper review, but fail to disclose its affiliation with the already-investigated company. While the review is being conducted, the new

entity is free to export its merchandise while only posting a bond or other security. This creates an opportunity for the original company to then ship through its newly created conduit and enter the market with very low-priced merchandise. If this arrangement is not discovered during the new shipper review, the conduit will receive no, or a very low, margin and can continue to serve the market with the original company's merchandise. However, even if the arrangement is uncovered during the review, the original company will have succeeded in delaying imposition of antidumping duties by many months or even years on its shipments through its conduit. In the meantime, the circumstances that caused material injury to the domestic industry, which had already established its entitlement to protection under the ADA, will continue unabated.

This Group should examine these and other concerns to determine whether the ADA and the ASCM require clarification to prevent such misuse. Our work in this area will help to address the difficulties in Members' ability to enforce the trade remedy laws.

Critical Circumstances

Article 10.6 of the ADA and Article 20.6 of the ASCM provide for the retroactive levying of antidumping duties, and assessment of countervailing duties, where massive imports over a short period of time cause injury that is difficult to remedy. However, the retroactive imposition of duties is limited to 90 days prior to the application of provisional measures. In practice, these provisions have sometimes proven to be ineffective in preventing massive imports of injurious dumped and subsidized merchandise prior to the application of provisional measures.

It is the United States' experience that, in some cases, where importers anticipate that an impending preliminary determination is likely to result in the imposition of provisional measures, imports surge prior to that determination. Although the Agreements contain critical circumstances provisions allowing for the retroactive imposition of duties 90 days prior to the date of the application of provisional measures, these provisions are of limited effectiveness. Frequently, importers have knowledge of an impending investigation even before the application is filed and imports begin to surge at that time, well before the 90 days prior to a preliminary determination. Therefore, the finding of critical circumstances and resultant retroactive application of duties may not provide a sufficient remedy. The Group should consider clarifying what provisional steps are appropriate to preserve the right to impose duties retroactively.

The purpose of Article 10.6 and Article 20.6 is to ensure that any surge in imports prior to the imposition of a provisional measures does not undermine the remedial effect of the measure. This Group should consider clarifications and improvements to these provisions in order to make them more effective.

Persistent Dumping/Subsidization

In its recent submission,[1] Canada raised the issue of persistent dumping, which it termed "repeated dumping." We agree with Canada that this an important issue that needs to be addressed. We believe that this issue is of equal concern with respect to injurious subsidization.

The ADA and the ASCM do not address adequately the serious issue of persistent dumping or subsidization. There are two aspects to this issue, both of which should be discussed within the context of the Group. The first aspect for consideration is the issue of persistent dumping of the same product imported from different countries. In the United States' experience, there have been cases where imports of a particular product surge from countries that are not covered by an antidumping measure immediately or soon after such a measure has been applied to another country. Import surges of products from other countries not subject to the antidumping measure can quickly undercut the remedial effects of the measure if those products are sold at dumped prices, thereby undermining the effectiveness of the Agreement. In such situations, expedited procedures may be necessary to determine whether the newly surging imports are being dumped and causing material injury. This is a problem that warrants further consideration by this Group.

The second aspect for consideration is the issue of persistent dumping and/or subsidization of the same product, by the same producer/country, being exported to numerous countries around the world. It is not uncommon for Members to witness the imposition of numerous measures around the world against the same product being dumped/subsidized by the same producer/country. This indicates that, rather than responding appropriately to legitimate trade remedies imposed by one Member, the exporter chooses to shift export markets for its dumped/subsidized products to another Member. The harmful effects of this behavior may be particularly acute when an exporter shifts its dumped/subsidized products into a developing country's market. It would be useful for this Group to consider whether the Agreement could be improved to address the issue of persistent dumping/subsidization.

Small Economies: Regional Authority

The Mandate calls for Members to take into account the needs of developing and least-developed participants. On behalf of a number of Members,[2] a proposal was raised, within the Work Programme on Small Economies of the Committee on Trade and Development, describing

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[1] *Submission from Canada Respecting the Agreement on Implementation of Article VI of the GATT 1994 (The Anti-Dumping Agreement),*" (TN/RL/W/47, 28 January 2003).

[2] See, *Concrete proposals to address certain specific concerns and problems affecting the Trade of Small Economies*, Communication from Barbados, Belize, Bolivia, Dominican Republic, Guatemala, Honduras, Mauritius and Sri Lanka, WT/COMTD/SE/W/3 (June 28, 2002). At the formal sessions of the Dedicated Work Programme on Small Economies, Cuba, El Salvador, Fiji, Nicaragua and Paraguay added their delegations to the list of Members co-sponsoring the paper. WT/COMTD/44 (December 9, 2002). We note that at the time, the United States suggested that this would be an important issue to be addressed by the Negotiating Group on Rules. WT/COMTD/SE/W/7 (November 4, 2002).

resource problems of certain Members in attempting to exercise their rights and obligations under the ADA and ASCM. To address this concern, with specific regard to the ADA and ASCM, the proposal called for the recognition that small economies that do not have the resources to maintain a "competent authority"can designate a regional body as their competent authority. The ability of developing and least-developed countries to adopt and administer appropriate trade remedy laws is extremely important. This Group should consider how such a regional authority might function, and any changes to the ADA and ASCM which may be necessary.

Conclusion

The above items represent some of the current issues that would benefit from clarification and improvement. The issues presented herein are precisely the kind of work Ministers have called for – to clarify and improve, while preserving the basic concepts, principles, and effectiveness of, the Agreements. We intend to provide additional detail on these points and other possible areas of discussion in future submissions.